

Joseph J. Tabacco, Jr. (75484)  
Email: jtabacco@bermanesq.com  
Nicole Lavallee (165755)  
Email: nlavallee@bermanesq.com  
**BERMAN DEVALERIO PEASE TABACCO  
BURT & PUCILLO**  
425 California Street, Suite 2100  
San Francisco, CA 94104  
Telephone: (415) 433-3200

*Proposed Liaison Counsel*

Christopher Lometti  
Email: chris@spornlaw.com  
Ashley Kim  
Email: Ashley@spornlaw.com  
**SCHOENGOLD SPORN LAITMAN  
& LOMETTI, P.C.**  
19 Fulton Street, Suite 406  
New York, New York 10038  
Telephone: (212) 964-0046

*Proposed Lead Counsel for the Class  
and Attorneys for the IBEW Local 363  
Pension and Benefit Funds*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

JOEL EICHENHOLTZ, Individually and On  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

VERIFONE HOLDINGS, INC., DOUGLAS G.  
BERGERON, and BARRY ZWARENSTEIN,

Defendants.

**ECF CASE**

**No. 07-CV-6140-MHP**

**NOTICE OF MOTION AND  
MEMORANDUM OF LAW IN SUPPORT  
OF THE IBEW LOCAL 363 PENSION  
AND BENEFIT FUNDS' MOTION FOR  
CONSOLIDATION, APPOINTMENT OF  
LEAD PLAINTIFF, AND APPROVAL OF  
LEAD COUNSEL**

Date: March 17, 2008

Time: 2:00 PM

Courtroom: 15

**NOTICE OF MOTION AND MOTION**

**TO: ALL PARTIES AND THEIR COUNSEL OF RECORD**

PLEASE TAKE NOTICE, that on March 17, 2008 at 2:00 PM, or as soon as counsel may be heard, the undersigned will move this Court before the Honorable Marilyn H. Patel, at the United States District Court for the Northern District of California, 450 Golden Gate Ave., San Francisco, CA 94102, pursuant to Rule 42 of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995, for an Order:

1. consolidating with the above-captioned action any and all cases filed in this District which allege one or more common questions of law or fact;

2. appointing the IBEW Local 363 Pension and Benefit Funds (the "IBEW Funds") as Lead Plaintiff on behalf of the Class;

3. approving the IBEW Funds' choice of Schoengold Sporn Laitman & Lometti, P.C. as Lead Counsel for the Class and Berman DeValerio Pease Tabacco Burt & Pucillo as Liaison Counsel; and

4. granting such other and further relief as the Court may deem just and proper. Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiff hereby demands trial by jury of all issues that may be so tried.

The IBEW Local 363 Pension and Benefit Funds (the "IBEW Funds") respectfully submit this memorandum of law in support of their motion for: (i) consolidation of any and all cases filed in this District which allege one or more common questions of law or fact (the "Related Actions") with the above-captioned action; (ii) appointment of the IBEW Funds as Lead Plaintiff; and (iii) approval of Schoengold Sporn Laitman & Lometti, P.C. ("SSLL") as Lead Counsel and Berman DeValerio Pease Tabacco Burt & Pucillo ("Berman DeValerio") as Liaison Counsel.

**MEMORANDUM OF LAW**

**I. INTRODUCTION**

Currently, there are nine securities class action lawsuits pending in this District against Verifone Holdings, Inc., et al., ("Verifone" or the "Defendants")<sup>1</sup>: *Eichenholtz v. Verifone*

<sup>1</sup> On January 30, 2008, a Notice of Voluntary Dismissal was filed by Plaintiff Peter A. Kraft in *Kraft v. Verifone Holdings, Inc., et al.*, 07CV01588 in the Southern District of Indiana.

1 *Holdings, Inc. et al.*, 07CV06140; *Lien v. Verifone Holdings, Inc. et al.*, 07CV06195; *Vaughn et al*  
 2 *v. Verifone Holdings, Inc. et al.*, 07CV06197; *Feldman et al v. Verifone Holdings, Inc. et al.*,  
 3 07CV06218; *Cerini v. Verifone Holdings, Inc. et al.*, 07CV06228; *Westend Capital Management*  
 4 *LLC v. Verifone Holdings, Inc. et al.*, 07CV06237; *Hill v. Verifone Holdings, Inc. et al.*,  
 5 07CV06238; *Offutt v. Verifone Holdings Inc. et al.*, 07CV06241; and *Feitel v. Verifone Holdings,*  
 6 *Inc. et al.*, 08CV00118. All nine of these cases involve common questions of law and fact.<sup>2</sup>

7 The first notice of pendency of class action was published pursuant to the Private Securities  
 8 Litigation Reform Act of 1995 (the “PSLRA”) in a national, business-oriented wire service on  
 9 December 4, 2007 (See Declaration of Ashley Kim in Support of the Within Motion (the “Kim  
 10 Dec.”), Exhibit (“Ex.”) A). This motion is being filed within 60 days from the date of publication  
 11 of that notice.

12 As set forth in the Certification of Securities Class Action Complaint (annexed as Ex. B to  
 13 the Kim Dec.), the IBEW Funds expended approximately \$125,479.66 to purchase 2,767 shares of  
 14 Verifone during the Class Period. As a result of those purchases and the subsequent stock price  
 15 decline at the close of the Class Period, the IBEW Funds have lost approximately \$70,376.00.  
 16 Accordingly, it is respectfully submitted that the Court should consolidate the Related Actions,  
 17 appoint the IBEW Funds as Lead Plaintiff most capable of adequately representing the interests of  
 18 the Class and approve the IBEW Funds’ selection of SSSL as lead counsel and Berman DeValerio  
 19 as liaison counsel. Both SSSL and Berman DeValerio have extensive experience in securities  
 20 fraud litigation and have won many important victories for injured shareholders. *See* Kim Dec.,  
 21 Exs. C and D.

## 22 **II. THE RELATED ACTIONS SHOULD BE CONSOLIDATED**

23 This Action alleges securities claims against Verifone and certain officers. The  
 24 subsequently-filed actions enumerated above allege one or more common questions of law or fact.  
 25 As a result, they should be consolidated pursuant to Rule 42 of the Federal Rules of Civil

26 <sup>2</sup> On January 18, 2008, all parties to these nine actions have stipulated to a Stipulation and  
 27 [Proposed] Order Consolidating Related Cases, which is currently pending before this Court. On  
 28 January 25, 2008, Defendants submitted an administrative motion requesting these nine cases be  
 deemed related and assigned to the Honorable Marilyn H. Patel.

1 Procedure (“when actions involving a common question of law or fact are pending before the court,  
2 it may order all the actions consolidated . . . and it may make such orders concerning proceedings  
3 therein as may tend to avoid unnecessary costs or delay”). Fed. R. Civ. P. 42 (a).

4 **III. THE IBEW FUNDS ARE THE MOST ADEQUATE PLAINTIFFS UNDER THE**  
5 **EXCHANGE ACT**

6 On December 22, 1995, Congress enacted Public Law 10467, entitled the Private Securities  
7 Litigation Reform Act of 1995 (the "PSLRA"). The PSLRA amends the Securities Exchange Act  
8 (the "Exchange Act") to include a new Section 21D that, *inter alia*, sets forth a detailed procedure  
9 for selecting the lead plaintiff to oversee class actions brought under the federal securities laws.

10 Section 21D(a)(3)(B)(i) of the Exchange Act directs the court to appoint as lead plaintiff  
11 “the member or members of the purported plaintiff class that the court determines to be most  
12 capable of adequately representing the interests of class members.” Section 21D(a)(3)(B)(iii)  
13 requires a presumption that the most adequate plaintiff:

- 14 (aa) has either filed the complaint or made a motion in response to a notice under [the  
15 PSLRA];
- 16 (bb) in the determination of the court, has the largest financial interest in the relief sought  
17 by the class; and
- 18 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil  
19 Procedure.

20 Section 21D(a)(3)(B)(iii).

21 The goal of Congress in enacting this provision was to “empower investors” to “have the  
22 greater control over class action cases.” *See* “Private Securities Litigation Reform Act of 1995 --  
23 Conference Report,” 141 Cong. Rec. S17933-97, at S17956 (daily ed. Dec. 5, 1995).

24 The IBEW Funds are institutional investors that have been injured by the fraudulent  
25 conduct of Defendants. House Commerce Committee Chairman Thomas Bailey has emphasized  
26 that the PSLRA was designed to “put control of class action lawsuits back in the hands” of “real  
27 shareholders” -- like the IBEW Funds. *See* “Private Securities Litigation Reform Act of 1995 -  
28 Conference Report,” 141 Cong. Rec. H14039-52, at H14039 (daily ed. Dec. 6, 1995).

Moreover, in order to reduce “lawyer-driven” litigation, “through the PSLRA, Congress has clearly expressed its preference for securities fraud litigation to be directed by large institutional investors.” *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 548 (N.D. Tex. 1997). *See also, Sakhrani v. Brightpoint*, 78 F. Supp. 2d 845, 850 (S.D. Ind. 1999) (“The PSLRA was enacted with the explicit hope that institutional investors would step forward to represent the class and exercise effective management and supervision of the class lawyers”). By appointing the IBEW Funds as Lead Plaintiff in this case, the Court would be fulfilling one of Congress’s major aims in passing the PSLRA, namely giving institutional investors an increased role in securities class actions. In addition, the IBEW Funds have a major financial stake in this litigation. As set forth more fully in their Certification of Securities Class Action Complaint, the IBEW Funds expended approximately \$125,479.66 to purchase 2767 shares of Verifone during the Class Period. As a result of the wrongful conduct alleged, the IBEW Funds have lost approximately \$70,376.00 in connection with these transactions. *See Kim Dec., Ex. B.* Thus, the IBEW Funds are precisely the type of investors that should be appointed as Lead Plaintiff in the consolidated action.

Section 21D(a)(3)(B) of the Exchange Act further provides that the lead plaintiff must also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” Rule 23(a) provides that a party may serve as a class representative only if the following four requirements are satisfied:

- (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

For purposes of appointing the lead plaintiff, “of the four prerequisites to class certification, the focus is only on the typicality (Rule 23(a)(3)) and adequacy (Rule 23(a)(4)) requirements.” *Fields v. Biomatrix, Inc.*, 198 F.R.D. 451, 456 (D.N.J. 2000) (citation omitted); *see also, Gluck v. CellStar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex. 1997). As a general rule, a plaintiff’s claim meets the typicality requirement if it is both legally and factually similar and arises out of the same events or course of conduct that gives rise to the claims of the other class members. This does not

1 require that the claims be identical, but there must be some common question of fact or law. *See In*  
 2 *re Independent Energy Holdings PLC Sec. Litig.*, 2002 U.S. Dist. LEXIS 9359, at \*12 (S.D.N.Y.  
 3 May 28, 2002) (citing *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir.  
 4 1992)). Here, the IBEW Funds' claims are typical, if not identical, to the claims of the members of  
 5 the Class. As set forth above, the losses suffered by the IBEW Funds resulted from Defendants'  
 6 common course of conduct which violated the Exchange Act by publicly disseminating materially  
 7 false and misleading information. Thus, the IBEW Funds satisfy the typicality requirement.

8 Further, Section 21D(a)(3)(B)(iii) of the Exchange Act directs the Court, in evaluating the  
 9 adequacy of a proposed lead plaintiff, to limit its inquiry to the existence of any conflicts between  
 10 the interests of the proposed representative and members of the class, and allows the lead plaintiff  
 11 to retain counsel of their choice to represent the Class "subject to the approval of the court." *See*  
 12 Exchange Act § 21D(a)(3)(B)(v). The adequacy standard is met where (1) the named plaintiff has  
 13 interests common with the Class' interests; and (2) the representatives will vigorously pursue the  
 14 interests of the Class through qualified counsel. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*,  
 15 222 F.3d 52, 60 (2d Cir. 2000) (citing *Drexel*, 960 F.2d at 291).

16 As set forth above, the IBEW Funds' interests are clearly aligned with the members of the  
 17 Class, and there is no evidence of any antagonism between their interests and those of the Class.  
 18 The IBEW Funds share numerous common questions of law and fact with the members of the  
 19 Class, and their claims are typical of the members of the Class. Further, the IBEW Funds have  
 20 retained competent counsel to represent it in this case. Thus, the alignment of interests between the  
 21 IBEW Funds and the Class and the skill of the IBEW Funds' chosen counsel favor granting the  
 22 instant motion.

#### 23 **IV. THE COURT SHOULD APPROVE THE IBEW FUNDS' CHOICE OF COUNSEL** 24 **AS LEAD COUNSEL**

25 The amendments to the Exchange Act vest authority in the lead plaintiff to select and retain  
 26 lead counsel, subject to the approval of the court. *See* Exchange Act §21D(a)(3)(B)(v). A court  
 27 should not disturb the lead plaintiff's choice of counsel unless necessary to protect the interests of  
 28 the plaintiff class. In the present case, the IBEW Funds have retained SSL as Lead Counsel to

pursue this litigation on their behalf. As stated above, SSLL has extensive experience in securities fraud litigation. As a result, the IBEW Funds' choice of counsel should not be disturbed.

**V. CONCLUSION**

For all the foregoing reasons, the IBEW Funds respectfully request that the Court grant the instant motion and:

(i) consolidate the Related Cases for all purposes, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure;

(ii) appoint the IBEW Funds as Lead Plaintiff in the above-captioned action and in the actions to be consolidated herewith pursuant to Section 21D(a)(3)(B) of the Exchange Act;

iii) approve the IBEW Funds' choice of counsel and appoint SSLL as Lead Counsel and Berman DeValerio as Liaison Counsel pursuant to Section 21D(a)(3)(B)(v) of the Exchange Act; and

iv) grant such other and further relief as the Court may deem just and proper.

Dated: February 4, 2008

**BERMAN DeVALERIO PEASE TABACCO  
BURT & PUCILLO**

By: /s/ Nicole Lavallee

Nicole Lavallee (165755)

Joseph J. Tabacco, Jr. (75484)

425 California Street, Suite 2100

San Francisco, CA 94104

Telephone: (415) 433-3200

Facsimile: (415) 433-6382

*Proposed Liaison Counsel*

**SCHOENGOLD SPORN LAITMAN  
& LOMETTI, P.C.**

Christopher Lometti (CL-9124)

Ashley Kim (AK-0105)

19 Fulton Street, Suite 406

New York, NY 10038

Telephone: (212) 964-0046

*Proposed Lead Counsel for the Class  
and Attorneys for the IBEW Local 363  
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